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IN THE SUPREME COURT OF THE UNITED STATES

BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

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Petitioners,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

Agudath Israel of America is a national Orthodox Jewish organization with constituents, and constituent religious bodies, across the United States. Many of Agudath Israel's constituent congregations and other Orthodox Jewish religious bodies, as well as Agudath Israel itself, sponsor youth

programs. Some of these programs are religious in nature, some are social, some educational, some recreational -- but all of them are under control of a religious denomination that regards sexual activity outside the context of marriage as sinful, and whose attitude toward homosexual conduct specifically is shaped by the biblical description of such conduct as "*to'eivah*", an abomination (*Leviticus* 20:13). Further, all of them would regard a homosexual activist as an inappropriate role model for children under his leadership and care.

As previously indicated in Agudath Israel's November 26, 1999 *amicus curiae* submission in support of the petition, and as elaborated below, our interest in this case is substantial -- for while this particular dispute may not involve a "bona fide religious or sectarian institution," 734 A. 2d at 1217,* it could well be that the long term impact of the decision below, if it is allowed to stand, will be felt acutely -- perhaps even most acutely -- in traditional religious communities like ours. We respectfully make this *amicus curiae* presentation, upon the consent of the parties, to expand upon why this is so (Point I of the Argument below); and to urge the Court to recognize the heightened level of constitutional protection for decisions by groups like the Boy Scouts on an individual's suitability to serve in a position of role model leadership (Point II below).

Pursuant to Rule 37.6 of the Rules of this Court, the undersigned counsel for Agudath Israel represent that they are the sole authors of this brief, and that no person or entity other than Agudath Israel made any monetary contribution toward the preparation or submission of this brief. (Counsel acknowledge the significant assistance of Moshe Klein, a third-year student

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* All citations to the decision below are to *Dale* v. *Boy Scouts of America*, 734 A. 2d 1196 (N.J. 1999).

at the Columbia Law School, in the research and preparation of this brief.)

ARGUMENT

I.

A GENEROUS READING OF THE FIRST AMENDMENT'S FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION CLAUSES MAY BE NECESSARY TO PROTECT RELIGIOUSLY-AFFILIATED PROGRAMS FACED WITH CONFLICTS BETWEEN CIVIL RIGHTS LAWS AND THEIR RELIGIOUS TENETS

The starting point of our concern is the current state of free exercise jurisprudence. In the aftermath of this Court's rulings in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990) (positing that a religious practice that is indirectly burdened by government enjoys no First Amendment free exercise protection), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act, Congress' effort to respond to *Smith* by establishing a statutory compelling interest standard for indirect burdens on religious exercise), religious practitioners are especially vulnerable to anti-discrimination provisions that conflict with their religious tenets. Civil rights laws are, after all, laws of general applicability, and the burdens they may impose on religious individuals or organizations are only indirect. The free exercise clause thus offers scant comfort to the person or entity whose faith demands that he or it engage in conduct that in the eyes of secular law constitutes unlawful discrimination.

Comfort, if it is to be had, will often come in the form of legislation expressly exempting certain types of religious practitioners from generally applicable anti-discrimination

provisions. *See Employment Division* v. *Smith, supra,* 494 U.S. at 890. However, such exemption provisions are by no means universal features of all anti-discrimination laws; *see, e.g., Gay Rights Coalition* v. *Georgetown University Law Center*, 536 A.2d 1 (D.C. App. 1987). Some legislative bodies, apparently, are not prepared to grant religious entities the authority to practice their faith in a manner that would infringe on the civil rights of others. Indeed, current congressional efforts to enact the Religious Liberty Protection Act, a federal statute designed to restore the free exercise compelling interest test in a manner consistent with this Court's decision in *City of Boerne, supra,* are now enmeshed in fierce debate over whether the law should extend to conflicts that may arise between civil rights and religious practice. (*See* Jacobson, *A Coalition With a Liberal-Leave Policy*, The National Journal (Oct. 30, 1999).)

Moreover, even where a legislature does deem it appropriate to exempt religious bodies from anti-discrimination laws, the exemption is often narrowly drawn and narrowly construed. The instant case is a good example. New Jersey's Law Against Discrimination exempts "educational facilit[ies] operated or maintained by a bona fide religious or sectarian institution." N.J.S.A. 10:5-5l. As determined by the court below, 734 A.2d at 1217 & n.10, Boy Scouts of America does not fit the category of an "educational facility" -- despite the Boy Scouts' close affiliation with public schools and school-affiliated groups, described in detail at 734 A.2d at 1212-13; and despite the organization's express purpose of "teach[ing]" its members "patriotism, courage, self-reliance and kindred virtues", *id.* at 1202. Nor does it fit the category of a "bona fide religious or sectarian institution" -- despite a scout's Oath "to do [his] duty to G-d" and the Scout Law that requires a scout to be "reverent toward G-d [and] faithful in his religious duties." *Id.* The court's back-of-the-hand, "deserves little discussion," rejection of the Boy Scouts' efforts to claim the statutory religious educational facility exemption, *id.* at 1217,

would appear to flow directly from the court's rule of statutory construction that "exemptions from remedial statutes should generally be narrowly construed." *Id.* at 1213.

There is no statutory refuge, therefore, for religiously inspired or affiliated entities in New Jersey deemed to fall beyond the narrowly construed confines of the exemption statute -- or for religious institutions across the country in jurisdictions where there is no statutory exemption altogether.

However, there still may be *constitutional* refuge: the First Amendment's freedom of speech and freedom of association provisions, whether viewed independently or "in conjunction" with a free exercise claim under the *Smith* Court's "hybrid situation" doctrine, 494 U.S. at 881-82. (*See, e.g., Thomas* v. *Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999).) Like-minded religious practitioners are entitled to band together "for the purpose of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 618 (1984). And their freedom of speech includes "the autonomy to choose the content of [their] own message," including "what not to say." *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). If the decision of the court below is allowed to stand, though, these avenues of potential protection against efforts to compel a religious group's compliance with religiously objectionable anti-discrimination provisions may also be foreclosed.

Several aspects of the constitutional analysis below portend jeopardy for religious groups that sponsor youth programs like those described in the first paragraph of this brief: the court's refusal to accept Boy Scouts' own interpretation of its own requirement that scouts be "morally straight" and "clean", *see* 734 A.2d at 1224 & n.12; the

court's scornful disdain and legal rejection of the traditional view that homosexual conduct is immoral (*id.* at 1226-28; see also, and especially, Justice Handler's concurring opinion, *id.* at 1242-45); the court's bald conclusion that Boy Scouts' acceptance of a prominent homosexual activist in a role model position of scout leadership would not be "symbolic of Boy Scouts' endorsement of homosexuality", and that compelling Boy Scouts to do so does not constitute "forced speech". *Id.* at 1229.

The impact of these conclusions on the many religiously-sponsored Boy Scout programs across the nation will surely be substantial. Already one major denomination has declared its intention to withdraw from Scouting if its Boy Scout units are legally compelled to accept openly homosexual leaders, and other major denominations may arrive at the same conclusion. *See* Brief of National Catholic Committee on Scouting, *et al.*, As *Amici Curiae* In Support of the Petition, at 11-12. In fact, if the Court embraces the reasoning and conclusions of the New Jersey Supreme Court, the impact on religiously-sponsored programs could well be felt considerably beyond the confines of Scouting.

Consider, for example, the case of a religiously-affiliated summer camping program that refuses to hire as a counselor, or a synagogue-sponsored youth group that refuses to engage as a leader, a person whose individual lifestyle may conform to contemporary notions of personal morality but flies in the face of the religious teachings of the sponsoring faith group. The camp and the youth program may have a hard time persuading a court following the New Jersey Supreme Court's lead that the purpose of their members' association is to disseminate messages about the religious propriety or impropriety of any given lifestyle. They might have a similarly hard time pointing to any specific language in their bylaws that

speaks about such lifestyles. They may, in short, face legal hurdles substantially identical to the ones the Boy Scouts faced here.

To be sure, legal arguments may well be available for the proposition that religiously-affiliated youth programs should be entitled to greater autonomy than that enjoyed by Boy Scouts in determining who should serve as role model leaders. It is possible that the religious program may employ membership criteria sufficiently selective as to avoid being considered a place of public accommodation. Or perhaps the sponsoring denomination's unambiguous condemnation of a particular lifestyle would be seen as infusing all of the programs it sponsors with an expressive purpose that would trigger greater First Amendment speech and association protection. Or perhaps the scope of free exercise protection will one day be extended, either through constitutionally acceptable legislative action or through the Court's judicial reconsideration of *Employment Division v. Smith, supra*, to cover situations where a law of general applicability impinges upon a religious entity's ability to practice its faith. All of these are possibilities -- but no more than that.

Stated simply, the dangers of disallowing private entities like Boy Scouts of America from embracing their own notions of moral propriety and role model fitness could have ramifications, especially in this era of limited free exercise protection, that threaten the religious independence of countless programs and institutions across the country.

Indeed, if current social trends are any indication, there may come a time when groups like the Boy Scouts may alter their perspective on the morality of homosexual or other non-traditional sexual conduct. Religious denominations like Orthodox Judaism, though -- and the numerous other faith groups across this nation that are not prepared to concede the irrelevancy of *Leviticus* -- are likely to remain stubborn

holdouts. Our stake in an America that allows orthodox faiths to dissent from the secular orthodoxies of the day is substantial and enduring, and merits special consideration in this case.

II.

WHEN EVALUATING A PROSPECTIVE SCOUTMASTER'S SUITABILITY AS A ROLE MODEL LEADER, IT IS CONSTITUTIONALLY PROPER FOR BOY SCOUTS TO CONSIDER HIS STATUS AS A PRACTICING HOMOSEXUAL

When Boy Scouts first notified Mr. Dale that his position as an Assistant Scoutmaster was being terminated, they informed him by letter dated August 10, 1990 that "[t]he grounds for this membership revocation are the standards for leadership established by Boy Scouts of America, which specifically forbid membership to homosexuals." Pouncing on this letter in the legal equivalent of a triumphant declaration of "Gotcha!", the court below gave no credence to subsequent letters from the Boy Scouts in which the organization indicated that Dale's avowed homosexuality was at odds with Boy Scouts' views of the immorality of homosexual conduct, concluding instead that "[t]he original termination letter expresses Boy Scouts' real concern: Dale's status as a homosexual." 734 A.2d at 1225.

In his concurring opinion, Justice Handler emphasizes the point even more forcefully. Drawing a contrast between this case and *Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 952 P. 2d 218 (1998), in which membership was denied to an individual whose interest in becoming a Boy Scout leader was motivated by his personal belief in the homosexual lifestyle and his desire "to make sure that other kids understood that," 952 P. 2d at 254 (Kennard, J., concurring), Justice Handler points to the fact that Mr. Dale has merely stated his identity as a homosexual and has not

"express[ed] a view about homosexuality generally or specifically advocate[d] that homosexuality is moral." 734 A. 2d at 1240 & n.5 (Handler, J., concurring). This leads to the conclusion that "Boy Scouts excluded Dale based on his status as a homosexual." *Id*.

The glaring flaw in both the majority and concurring opinions is their failure to acknowledge the role model position a Boy Scout leader occupies. Scoutmasters are expected to provide their adolescent charges affirmative guidance and advice on the most sensitive personal issues. Thus *The Boy Scout Handbook* advises a Scout: "If you have any questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your...Scoutmaster." [A. 2532, cited in Petition, at 6.] *The Scoutmaster's Handbook* furnishes a corresponding instruction to Scoutmasters: "Be accepting of their concerns about sex. Be very open and clear when talking with them" [A. 2692, cited in Petition, at 6]; as well as the advice, in a section of the *Handbook* on "Sexual Curiosity," that "[i]f Scouts come to you to ask questions or seek advice, you would give it within your competence." [A. 3588-89, cited in Petition, at 17.]

In determining the suitability of declared homosexual to serve as a role model leader, it is thus entirely reasonable for the Boy Scouts to consider how his personal lifestyle might affect his ability to guide his youthful charges when they raise questions concerning issues of human sexuality. If, instead of being a declared homosexual, Mr. Dale were a notoriously promiscuous heterosexual, or if he were known to be abusive toward his companions, surely Boy Scouts would be within their authority to deny him a position of leadership – irrespective of whether he had declared his intention of promoting a promiscuous or abusive lifestyle as a Scoutmaster. His personal status alone would provide sufficient basis for Boy Scouts to reject him as a suitable role model.

The Court's description of a teacher in *Ambach* v. *Norwick*, 441 U.S. 68, 78-79 (1979) -- "a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and attitudes" -- is an equally apt description of a Boy Scouts leader. And just as courts have recognized the rights of private educational institutions to consider personal status in rejecting teachers they deem to be inappropriate role models for their students (see cases cited in Petition, at 15-16 n.7), so too should the Court recognize the right of an organization like Boy Scouts to consider personal status in rejecting a person it deems to be an inappropriate role model for their adolescent charges.

CONCLUSION

> "One particular stereotype we renounce today is that homosexuals are inherently immoral. That myth is repudiated by decades of social science data that convincingly establish that being homosexual does not, in itself, derogate from one's ability to participate in and contribute responsibly and positively to society... In short, a lesbian or gay person, merely because he or she is a homosexual, is no more or less likely to be moral that a person who is a heterosexual." 747 A. 2d at 1242-43 (Handler, J., concurring).

Were Justice Handler's morality lecture directed at those who regard persons with a homosexual *orientation* as inherently immoral, it would hardly be worthy of note. But it appears that His Honor has more on his mind, offering his comments in a case involving a sexually active homosexual for whom homosexual orientation is a license for homosexual conduct. Justice Handler's "renunciation" notwithstanding,

millions of Americans still cling to the "myth" that sexual activity between two persons of the same gender -- or for that matter any sexual activity outside the traditional marital relationship -- is immoral, and that persons who engage in such conduct are not proper role models for youngsters. That is the view of Boy Scouts of America, that is the view of numerous faith communities across the Untied States, and the law ought not compel its abandonment.

Amicus curiae Agudath Israel of America respectfully urges the Court to reverse the decision of the court below.

Respectfully submitted,

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